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No. _____

In The

Supreme Court of the United States

October Term 1996

TOTAL MEDICAL MANAGEMENT, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Can an appellate court raise a new issue *sua sponte* and reverse and dismiss a cause based only on such issue, when the new issue was not raised in hearings, on brief or in argument before the trial court or the appellate court and when the new issue appears to involve disputed material fact?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding. There are no parent or subsidiary companies.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit that gives rise to this petition is unpublished by order of the Federal Circuit. It is reprinted in the Appendix hereto ("App.") at App. 1. By order entered March 27, 1997, the Federal Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. 20. Orders relevant to this petition by the court below, the United States Court of Federal Claims, include: order on dispositive motions entered November 2, 1994 (App. 15); order denying motion to suspend entered May 24, 1995 (App. 17); and order denying motion to reconsider entered June 19, 1995 (App. 18).

JURISDICTION

On August 28, 1995, the Court of Federal Claims entered summary judgement in favor of Total Medical Management, Inc. ("TMM"), the petitioner herein, and against the United States of America. The United States timely appealed to the Court of Appeals for the Federal Circuit. On January 16, 1997, the Federal Circuit entered judgment in favor of the United States. On March 27, 1997, the Federal Circuit denied TMM's timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

REGULATION INVOLVED IN THE CASE

32 C.F.R. § 199.14(g)(1) (1990) provides:

(g) **Reimbursement of Individual Health-Care Professionals and Other Non-Institutional Health-Care Providers.** The CHAMPUS-determined reasonable charge (the amount allowed by CHAMPUS) for the services of an individual health-care provider (even if employed by or under contract to an institutional provider) shall be determined by one of the following methodologies, that is, whichever is in effect in the specific geographic location at the time covered services and supplies are provided to a CHAMPUS beneficiary.

(1) **Allowable charge method.** The allowable charge method is the preferred and primary method for reimbursement of individual health-care professionals and other non-institutional health-care providers.

(i) The allowable charge for authorized care shall be the lowest of the amounts identified in paragraphs (g)(1)(i)(A), (g)(1)(i)(B), and (g)(1)(i)(C) of this section;

(A) The billed charge for the service.

(B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.

(1) The 80th percentile of charges shall be determined on the basis of statistical data and methodology acceptable to the Director, OCHAMPUS, or a designee.

(2) The base period shall be a period of 12 calendar months and shall be adjusted at least once a year, unless the Director, OCHAMPUS, determines that a different period for adjustment is appropriate and publishes a notice to that effect in the Federal Register. Prior to publishing the final notice, a notice of intent shall have been published, which allowed a 30-day period for public comment on the proposed action.

(C) For charges from physicians and other individual professional providers, the fiscal year 1988 prevailing charges adjusted by the Medicare Economic Index (MEI), as the MEI is applied to Medicare prevailing charge levels.

(1) In any year in which the Medicare program applies a different MEI to primary care services, CHAMPUS will include maternity care and

delivery services and well baby care services as primary care for the purposes of applying the MEI.

(2) The Director, OCHAMPUS, shall issue procedural instructions to apply the MEI under CHAMPUS.

(ii) A charge that exceeds the prevailing charge can be determined to be allowable only when unusual circumstances or medical complications justify the higher charge. The allowable charge may not exceed the billed charge under any circumstances.

STATEMENT OF THE CASE

On December 8, 1992, TMM filed a complaint against the United States in the Court of Federal Claims pursuant to the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* The complaint sought reimbursement for health services provided to the Department of the Army pursuant to several Memorandum of Understanding ("MOUs").

On July 11, 1994, the parties filed cross-motions for summary judgment. In an unpublished order entered November 2, 1994, the court granted TMM's motion for summary judgment and denied the United States' cross-motion for summary judgment. App. 15. As reflected in the court's ruling from the bench, the motions addressed the meaning of a contractual term in the MOUs. App. 22.

On May 22, 1995, the United States filed a motion for leave to file a dispositive motion based on a finding in another Court of Federal Claims case in which the court held

that similar MOUs did not have the essential elements of government contracts. In an order entered May 24, 1995, the court denied the United States' motion (App. 17), and in an order entered June 19, 1995, the court denied a motion for reconsideration on the same grounds (App. 18).

The United States appealed the grant of summary judgment to the Court of Appeals for the Federal Circuit, which reversed the lower court and remanded the case with instructions to dismiss for failure to state a claim. App. 1. The Federal Circuit held that, even though the MOUs had the essential elements of government contracts, they were void *ab initio* because they were in conflict with 32 C.F.R. § 199.14(g)(1) (1990). Because of this conflict, the Court found that the government agents signing the MOUs had no authority to contractually bind the government. This issue was not raised or addressed by either party in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit.

REASONS FOR GRANTING THE WRIT

This case raises an important question of federal law that has not been, but should be, settled by this Court. At the heart of this question is a modern trend of appellate courts to ignore their original jurisdiction and take on the functions of trial courts.

The question involves three elements: first, the appellate court raised an issue not raised or passed on below; second, the appellate court raised the issue *sua sponte* after the conclusion of briefing and oral argument; and third, the appellate court reversed a summary judgment ruling with instructions to dismiss when the issue involved disputed material fact.

In *Singleton v. Wulff*, 428 U.S. 106, 120-121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976), this Court ruled that

questions may be taken up and resolved for the first time on appeal at the discretion of the appellate court. In *Singleton,* however, the action was remanded to give the petitioner an opportunity to present evidence or legal arguments. In the case herein, TMM was given no such opportunity.

Prior to *Singleton,* this Court sanctioned the practice of allowing an appellate court to resolve cases based on a new theory when the decision below was correct but the lower court relied on the wrong ground. *Helvering v. Gowran,* 302 U.S. 238, 245-246, 58 S.Ct. 154, 157-158, 82 L.Ed. 224 (1937). The rationale of affirming a correct decision under *Gowran* generally comports with the examples given thirty nine years later in *Singleton,* i.e., that a federal appellate court is justified in resolving an issue not passed on below where the proper resolution is beyond any doubt, where an injustice might otherwise result, or where the issue has been previously considered by this Court. These indicia still apply, but the case herein calls for a further clarification by this Court. The unsettled question for this Court is whether a court of appeals can deny a remand for further proceedings when it has not heard any argument on the decisive issue it raised *sua sponte* and there has been no discussion of the issue in the record below, notwithstanding the fact that the issue on its face appears to be one of disputed material fact. *Singleton* and the cases it cites leave this critical question unanswered and therefore creates a loophole for courts of appeal to deny litigants an opportunity to be heard.

The Federal Circuit's opinion in this case makes it clear that it rejects all of the arguments raised by the United States in opposition to the trial court's grant of summary judgment to TMM. The opinion then states, without detail, that, in spite of the MOUs having the essentials of government contracts, the MOUs are void *ab initio* because they are in conflict with 32 C.F.R. § 199.14(g)(1) (1990). The opinion does not state the nature of the conflict, such as

whether required language is not in the MOUs or whether the rate or amount of reimbursement was in excess of what was permitted by regulation. In fact, TMM's claimed reimbursements would not have exceeded the maximum allowed by the regulation, a hurdle which would have barred summary judgment. Whether or not the MOUs conflict with the regulation is clearly an issue of material fact in this case, although the Federal Circuit does not address this subject in its decision.

In addition to presenting an unsettled question of law, this Court should consider this petition because, in denying TMM an opportunity to be heard, the Federal Circuit decision has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

This case also presents a decision in conflict with the decisions of other United States courts of appeal in that other circuits have ruled that new issues or theories injected into the appeal by the appellate court must be adequately presented below. *Arlinghaus v. Ritenour,* 622 F.2d 629, 638 (2nd Cir.), *cert. denied,* 449 U.S. 1013, 101 S.Ct. 570, 66 L.Ed.2d 471 (1980); *Box v. A & P Tea Co.,* 772 F.2d 1372, 1376 (7th Cir. 1985); *Charbonnages de France v. Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979). As stated in *Heirs of Fruge v. Blood Services,* 506 F.2d 841, 844 n.2 (5th Cir. 1975), there must be:

> . . . a full and fair opportunity to develop facts relevant to the decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance but remand.

An opportunity to be heard is essential because appellate courts "lack original jurisdiction and are not equipped to

handle trial functions." *Miller v. Avirom,* 384 F.2d 319, 321 n.8 (D.C. Cir. 1967).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

TOTAL MEDICAL MANAGEMENT, INC.

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Appendix to Petition for Writ of Certiorari

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TOTAL MEDICAL MANAGEMENT, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

Case No. 96-5013

Decided: January 16, 1997

Before ARCHER, Chief Judge, MICHEL and RADER, Circuit Judges.

MICHEL, Circuit Judge.

OPINION

The United States ("government") appeals from the November 2, 1994 order of the United States Court of Federal Claims, No. 92-838C, granting summary judgment of contractual liability against the government in favor of Total Medical Management, Inc. ("TMM"). The order became final when, on August 31, 1995, the trial court entered judgment in TMM's favor in the amount of $57,197.50, plus interest[1]. The

[1] The amount of damages was stipulated by the parties.

appeal was submitted for our decision following oral argument on July 2, 1996. We hold that, because the applicable base reimbursement rate in this local contract conflicts with valid national regulations, the contract is void as beyond the authority of the government signatory. As such, we reverse and remand with instructions to dismiss for failure to state a claim upon which relief can be granted.

BACKGROUND

In 1956, Congress established a health plan for dependents of members of the uniformed services. This plan allowed for the provision of medical care at civilian medical facilities for those who could not be cared for at military medical facilities. See Dependents' Medical Care Act, Pub. L. No. 84-569, 70 Stat. 250 (1956) (codified as amended at 10 U.S.C. §§ 1071-1106) ("Act"). This plan has been implemented through the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"). 10 U.S.C. § 1074(4) (1994). The plan allows military hospitals and private health care companies to create facility-sharing arrangements. Specifically, according to section 1096(a) of the Act,

> The Secretary of Defense may enter into an agreement providing for the sharing of resources between facilities of the uniformed services and facilities of a civilian health care provider or providers that the Secretary contracts with under section 1079, 1086, or 1097 of this title if the Secretary determines that such an agreement would result in the delivery of health care to which covered beneficiaries are entitled under this chapter in a more

> effective, efficient, or economical manner.

10 U.S.C. § 1096(a) (1994). The Secretary of Defense has implemented this general power granted by Congress by encouraging military hospital commanders to enter into facility-sharing partnership agreements, upon approval of the Director of CHAMPUS and the Surgeon General of the appropriate military department, with private health care companies. See Department of Defense Instruction 6010.12, "Military-Civilian Health Services Partnership Program" (Oct. 22, 1987); 32 C.F.R. § 199.1(p) (1995) (permitting entry into agreements under "Military-Civilian Health Services Partnership Program"). These partnership agreements are typically memorialized in "Memoranda of Understanding" ("MOUs") or "Memoranda of Agreement" ("MOAs"). This arrangement saves the government the expense of reimbursement for treatment in expensive civilian medical facilities. This additional expense would otherwise be billed to CHAMPUS.

Instead of billing patients, the private health care companies that have entered into MOUs file claim forms with a fiscal intermediary (in TMM's case, the Associated Group) that processes and pays the claims. Prior to February 1989, the reimbursement rate scheme was as follows:

> The allowable charge for authorized care shall be the lower of:
>
> (A) The billed charge for the service;
>
> (B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.

32 C.F.R. § 199.14(h)(1)(i) (1989).

Effective February 1, 1989, Congress modified the CHAMPUS payment rules. Department of Defense Authorization Act of 1989, Pub. L. No. 100-463, § 8019, 102 Stat. 2270. The new reimbursement scheme is:

> The allowable charge for authorized care shall be the lowest of the amounts identified ... :
>
> (A) The billed charge for the service.
>
> (B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.
>
> . . .
>
> (C) For charges from physicians and other individual professional providers, the fiscal year 1988 prevailing charges adjusted by the Medicare Economic Index (MEI), as the MEI is applied to Medicare prevailing charge levels.

32 C.F.R. § 199.14(g)(1) (1990). The CHAMPUS Operating Manual and the Code of Federal Regulations both reflected this change in the reimbursement scheme, thus putting all program participants on constructive notice that the MEI could limit the reimbursement amount. 44 U.S.C. § 1507 (1994).

On November 10, 1988, TMM entered into an MOU with Ireland Army Hospital in Fort Knox, Kentucky, to provide internal medicine services for CHAMPUS

beneficiaries. The MOU contained the following provision relating to reimbursement rates for services provided under the agreement:

> ... Billing rates are as follows:
>
> (1) CHAMPUS eligibles at 75% of current CHAMPUS prevailing rate for outpatient services (current as of date of billing).
>
> (2) All others (primarily active duty military) at 75% of current CHAMPUS prevailing rate for all outpatient services.
>
> (3) All inpatient services at 80% of current CHAMPUS prevailing rate.

By letter dated February 10, 1989, the Associated Group informed TMM that the Internal Medicine MOU had been approved. In addition, the letter noted that

> all payments are based on the CHAMPUS allowable charge methodology; payment for a procedure will not exceed the area prevailing charge.

Similarly, the letter indicated that

> Partnership claims will be processed in the same manner as CHAMPUS claims and are subject to program and policy limitations . . . Payments may not exceed the CHAMPUS prevailing fees.

TMM entered into two other MOUs with the Army: a Primary Care MOU, executed June 7, 1989, and a Pediatric Care MOU, executed August 28, 1990. Both contained the same provisions regarding the "current CHAMPUS prevailing rate" billing rate; both were executed after the addition of the MEI reimbursement limitation to the CHAMPUS regulation.

In 1990, the Associated Group began reimbursing TMM according to the limitation imposed by the use of the MEI. On February 22, 1990, TMM sent a letter to Colonel James Henry, the Commander at the Fort Knox hospital, reporting that the MEI had been used in determining the amount that TMM was reimbursed for certain medical services. TMM pointed out that the Internal Medicine MOU called for reimbursement based upon "75% of the current CHAMPUS prevailing rate" and made no mention of the use of the MEI to limit payments.

Colonel Henry conveyed TMM's concern to the Army Health Services Command. In his letter, Colonel Henry sought clarification regarding the MEI limitation. The Associated Group prepared a response and sent it to CHAMPUS on May 10, 1990. This response indicated that the payments made by the Associated Group were in accordance with the MEI limitation in the CHAMPUS regulations. CHAMPUS then sent a response to the Army.

TMM and the Army re-executed the Primary Care and Pediatric Care MOUs at the end of each of the initial two year terms and re-executed the Internal Medicine MOU in February of 1991. The re-executed contracts were silent as to the MEI limitation. On February 22, 1991, the Associated Group sent a letter to TMM stating:

> Per the agreement, the reimbursement of your Partnership claims will be based on a single percentage of the profiled amounts (the prevailing charge or the maximum allowable prevailing charge

> (also called the Medicare Economic Index adjusted prevailing charge), whichever is lower). You may continue to bill your usual charge for each procedure.
>
> We will automatically calculate the negotiated percentage of the profiled amounts and reimburse you at the percentage of each procedure's profiled amount, or the billed charge, if lower.

Similar letters were sent in response to the other re-executions.

PROCEDURAL HISTORY

On April 10, 1992, TMM sent a claim under the Contract Disputes Act ("CDA") for $52,746.28 to Colonel Thomas Clements at Ireland Army Community Hospital. This amount was calculated as the difference between the actually reimbursed MEI rate and TMM's calculation of the contract rate. Colonel Clements responded: "Please be advised that I am not now nor have I ever been a contracting officer." The response also asserted that the MOUs were not properly subjects of a CDA claim.

TMM filed a complaint against the government in the Court of Federal Claims on December 8, 1992. The government moved for dismissal for lack of subject matter jurisdiction, RCFC 12(b)(1), arguing that (a) no contract existed, and (b) the claim was not properly brought under the CDA. The motion was denied on September 23, 1993. Total Med. Management, Inc. v. United States, 29 Fed. Cl. 296 (1993). As to the first of the government's arguments, the trial court reasoned:

> In this case, defendant, while implicitly acknowledging that plaintiff has alleged a

> contract, challenges the contract's existence. This is a challenge to the truth of the allegations, not to their sufficiency.... [S]uch a challenge is a merits question not amenable to resolution under a motion to dismiss for lack of jurisdiction.

Id. at 299-300. The court concluded that "a contract was properly pleaded, and we have jurisdiction to address the merits." Id. at 301. As to the second argument, the trial court stated:

> Defendant does not dispute that a properly certified claim was filed, but rather maintains that the hospital commander who received it was not an authorized contracting officer. While the proper submission of a certified claim to a contracting officer is a jurisdictional requirement, it is clear in this instance that defendant's contention that there was no authorized contracting officer to whom the claim could be submitted is predicated on the theory that no contract existed. Assuming that a contract existed here, it would plainly be covered by the CDA as a contract for services. As explained above, the existence of a contract is a question which cannot be disposed of at this juncture.

Id. As stated by the trial judge, the two arguments presented by the government are essentially the same: that there was no enforceable contract.

On July 11, 1994, the parties filed cross-motions for summary judgment on the issue of liability. On November 2, 1994, the trial court granted TMM's summary judgment motion and denied the government's motion. In a ruling from the bench, the trial judge held that liability turned on the meaning of the term "current CHAMPUS prevailing rate" used in the MOU. The judge agreed with TMM that this was the same as the "current CHAMPUS prevailing charge" as used in 32 C.F.R. § 199.14 (1990), rather than the "allowable rate," which, under the CHAMPUS regulations, would have included the MEI limitation.

On May 22, 1995, the government moved to suspend proceedings to provide further briefing on the argument that the MOUs were not enforceable contracts and requested leave to file a motion to dismiss for failure to state a claim upon which relief could be granted. This motion was denied on May 24, 1995 because of the prior disposition of all liability issues on summary judgment. A motion for reconsideration was denied on June 19, 1995.

DISCUSSION

The Tucker Act limits the jurisdiction of the Court of Federal Claims to

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1994). Although the government argues that jurisdiction is lacking because there was no

enforceable contract, the law is clear that, for the Court of Federal Claims to have jurisdiction, a valid contract must only be pleaded, not ultimately proven. Spruill v. Merit Sys. Protection Bd., 978 F.2d 679, 686 (Fed. Cir. 1992); Gould, Inc. v. United States, 67 F.3d 925, 929 (Fed. Cir. 1995). There is no question that TMM pleaded the existence of a valid contract here. The proper question, despite the government's label, is one of the merits: whether TMM failed to state a claim upon which relief can be granted. Id.

The requirements for a valid contract with the United States are: a mutual intent to contract including offer, acceptance, and consideration; and authority on the part of the government representative who entered or ratified the agreement to bind the United States in contract. Thermalon Indus., Ltd. v. United States, 34 Fed. Cl. 411, 414 (1995) (citing City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990) and Fincke v. United States, 230 Ct. Cl. 233, 244, 675 F.2d 289, 295 (1982)). In addition, government contracts must comply with statutorily sanctioned regulations. See, e.g., United States v. Amdahl Corp., 786 F.2d 387, 392 (Fed. Cir. 1986) (holding that a procurement contract award in conflict with statute and regulation was void ab intio). A contract which is "plainly illegal" is a nullity and void ab initio. Reiner v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963). A contract is "plainly illegal" when made contrary to statute or regulation either because of some action or statement by the contractor, or when the contractor is on "direct notice that the procedures being followed were violative of such requirements." Amdahl, 786 F.2d at 395 (quoting a decision of the Comptroller General, B-176393, 52 Comp. Gen. 214, 218 (1972) (citing Schoenbrod v. United States, 410 F.2d 400 (Ct. Cl. 1969))).

Here, the existence of the negotiated, signed MOUs evidences offer and acceptance. There was also consideration in the mutuality of obligation: TMM is to provide discounted

health care services; the Army is to provide support staff and free space in the military hospital.

The Contract Disputes Act defines a contracting officer as:

> any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority.

41 U.S.C. § 601(3) (1994). The Secretary of Defense has authority to enter into resource sharing "agreements" with civilian health care providers. 10 U.S.C. § 1096 (1994). In Department of Defense Instruction 6010.12, the Secretary authorizes hospital commanders to administer the partnership agreements and to encourage civilian health care providers to participate in them. Hospital commanders may execute an agreement only after submitting it for approval to the Director, CHAMPUS, and the Surgeon General of the appropriate military department. Department of Defense Instruction 6010.12(F)(1). The MOUs here were forwarded to the Associated Group, the CHAMPUS approval designee, and were approved. Therefore, we hold that the MOU was ratified by a government representative with the authority to bind the United States in contract. Thus, we hold all elements for a contract were met by the MOUs.

The government makes several arguments that the MOUs are generally unenforceable, none of which we find persuasive. For instance, the government argues that we should follow the Court of Federal Claims holding in Trauma Service Group, Ltd. v. United States, 33 Fed. Cl. 426 (1995),

appeal docketed, No. 95-5129 (Fed. Cir. July 14, 1995), that CHAMPUS MOUs are unenforceable agreements because they set forth no remedy for breach, do not demonstrate definitively the government's intent to be bound, and contain no method for determining a breach. The general rule is that, to be binding, a contract must be "sufficiently definite to permit determination of breach and remedies." Modern Sys. Tech. Corp. v. United States, 979 F.2d 200, 202 (Fed. Cir. 1992). Here, the government has not made a convincing argument that the MOUs are so indefinite as to preclude determination of breach and remedies. To the contrary, the obligations of the parties are clear: TMM is to provide discounted medical services; the hospital is to provide free space and support staff and to encourage dependents to use TMM's services. The CHAMPUS regulatory scheme provides payment details. The determination of damages or specific performance would flow naturally from a breach of these duties.

The government also argues that the resource sharing agreements are not contracts because they are not labeled "contracts" in the regulatory scheme. However, the failure of Congress to use the word "contract" does not preclude the holding that a binding contract is formed. See, e.g., Thermalon, 34 Fed. Cl. at 415 (holding that National Science Foundation "research grant" is a binding contract).

Finally, the government argues that, if contracts, the MOUs are not subject to the Contract Disputes Act, 41 U.S.C. § 602(a), because they are not procurement contracts for the benefit of the government. The government argues that the MOUs are solely for the benefit of the military dependents who receive the medical care. We reject this argument since it is clear that the government has legal obligations to military dependents and benefits by obtaining said dependents' care at a reduced cost.

However, even though the basic requirements for a government contract are met, the contract is void because the

MOUs are in direct conflict with CHAMPUS regulations. This regulatory scheme in effect at the time each of the contracts was entered into (or renewed), explicitly limited health care provider reimbursement base rates to the lowest of three possibilities: the billed charge, the prevailing charge, or the MEI limited prevailing charge. 32 C.F.R. § 199.14(g)(1) (1990). Neither the Secretary of Defense nor any of his designated representatives had the authority to obligate CHAMPUS beyond these base rates set by regulation. The government "is not bound by its agents acting beyond their authority and contrary to regulation." Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1153 (Fed. Cir. 1983) (quoting Yosemite Park & Curry Co. v. United States, 582 F.2d 552, 558 (Ct. Cl. 1978)); see also Office of Personnel Management v. Richmond, 496 U.S. 414, 428 (1990) (agencies' unauthorized statements to citizens cannot obligate the Treasury for the payment of funds). A contractor who enters into an arrangement with an agent of the government bears the risk that the agent is acting outside the bounds of his authority, even when the agent himself is unaware of the limitations on his authority. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

Furthermore, the illegality was "plain" under the Reiner test. 325 F.2d at 440. TMM was on constructive and actual notice that the CHAMPUS regulatory scheme would be used in determining payment rates. Each of the MOUs was either entered into or renewed after the new regulatory reimbursement scheme went into effect. Also, the Associated Group informed TMM in their approvals of the MOUs that "CHAMPUS allowable charge methodology" would be used in determining reimbursement rates. Since the contracts were "plainly illegal," they were void ab initio. A dismissal on this basis is one for failure to state a claim. Gould, 67 F.3d at 930.

Since the MOUs were void ab initio, TMM failed to state a claim upon which relief can be granted. We therefore

reverse and remand with instructions to dismiss for failure to state a claim.

REVERSED AND REMANDED.

COSTS:

Each party to bear its own costs.

UNITED STATES COURT OF FEDERAL CLAIMS

TOTAL MEDICAL MANAGEMENT, INC.,

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendant.

Case No. 92-838 C

Entered: November 2, 1994

ORDER ON DISPOSITIVE MOTIONS
AND RELATED PROCEDURAL MOTION

This order addresses Plaintiff's Motion for Summary Judgment filed July 11, 1994 and Defendant's Motion for Summary Judgment also filed on July 11, 1994. This order further addresses plaintiff's related motion filed October 21, 1994 for leave to file a supplemental affidavit pursuant to RCFC 56(f).

1. For reasons set forth at a hearing on November 2, 1994 (and which will be reflected in a transcript), it is ORDERED that plaintiff's motion filed October 21, 1994 (for leave to file a supplemental affidavit) is GRANTED.

2. Further, for reasons set forth at a hearing on November 2, 1994 (and which will be reflected in a transcript), it is ORDERED that Plaintiff's Motion for Summary Judgment (which addressed liability issues only) is hereby GRANTED and, consequently, that Defendant's Motion for Summary Judgment is hereby DENIED. Entry of judgment in

favor of plaintiff shall be withheld pending resolution of damages issues.

3. Not later than Monday, March 6, 1994, the parties shall file a further joint status report setting forth, *inter alia,* whether the parties have resolved differences pertaining to damages issues or, if not, a description of the damages issues which will require resolution by the court.

4. If the parties are unable to resolve damages issues between themselves, it is anticipated that precise dates for pre-trial conference and trial on damages issues and for submission of memoranda of contentions and other items described in paragraphs 11 through 15 of Appendix G, RCFC, shall be selected during an unrecorded telephone conference with counsel to be initiated by the court upon receipt of the joint status report designated in the preceding paragraph.

/s/ James T. Turner
Judge

UNITED STATES COURT OF FEDERAL CLAIMS

TOTAL MEDICAL MANAGEMENT, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 92-838C

Entered: May 24, 1995

ORDER

This order addresses defendant's motion filed May 22, 1995 to suspend the court's order of February 27, 1995 (pertaining to deadline for joint status report on damages) and for leave to file a dispositive motion in light of recent developments in the case law. *See Trauma Service Group, Ltd. v. United States,* No. 94-547 (Fed. Cl. May 5, 1995). Plaintiff opposes the motion.

As reflected in an order dated November 2, 1994, all liability issues in this case were resolved upon consideration and resolution of cross-motions for summary judgment. Nothing in *Trauma Service* persuades the court that any issue which was or might have been resolved by said summary judgment motions should be revisited.

Based on the foregoing, defendant's motion filed May 22, 1995 is DENIED.

/s/ James T. Turner
Judge

UNITED STATES COURT OF FEDERAL CLAIMS

TOTAL MEDICAL MANAGEMENT, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 92-838C

Entered: June 19, 1995

ORDER ON RECONSIDERATION

This order addresses defendant's motion filed June 1, 1995, pursuant to RCFC 59, to reconsider the court's order of May 24, 1995 denying defendant's motion to suspend the court's order to file status report on damages and for leave to file a dispositive motion.

Defendant's motion to suspend proceedings and for further briefing (filed May 22, 1995) was in reaction to a recent decision by another judge of this court holding that Memoranda of Understanding (MOUs) made pursuant to the CHAMPUS program are not binding, enforceable contracts. See *Trauma Service Group, Ltd. v. United States,* No. 94-547 (Fed. Cl. May 5, 1995). Defendant submits that the MOUs at issue here should be viewed similarly, i.e., as non-contractual, unenforceable agreements. We disagree with defendant's contentions.

The facts of the immediate case convince us that the said MOUs are plainly contracts resulting from an offer, acceptance, and consideration. The statutes which implement

the CHAMPUS program support this conclusion, anticipating that

> the Secretary of Defense ... shall *contract,* under authority of this section, for medical care for [military dependents] under such insurance, medical service, or health plans an he considers appropriate.

10 U.S.C. § 1079 (1995) (emphasis added). *See also* 10 U.S.C. §§ 1072(4), 1086, 1091, 1096 (1995) (referring to contracts made pursuant to CHAMPUS program). Furthermore, the case law upon which defendant relies is either unpersuasive or distinguishable. Accordingly, we are unconvinced that the order of May 24, 1995 should be modified in any way.[1]

Based on the foregoing, defendant's motion for reconsideration of the order of May 24, 1995 is DENIED.

/s/ James T. Turner
Judge

---

[1] In any event, defendant seeks to raise at this juncture an issue of which it was aware and which it could have appropriately raised during the briefing and consideration of cross-motions for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TOTAL MEDICAL MANAGEMENT, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

Case No. 96-5013

Entered: March 27, 1997

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 3, 1997.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: March 27, 1997

/s/ Brian P. LeDuc
Associate Chief Deputy Clerk

cc: R. Alan Miller
John Clifton Rand

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF FEDERAL CLAIMS

TOTAL MEDICAL MANAGEMENT, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Case No. 92-838C

Court 7, Room 508
U.S. Court of Federal Claims
National Courts Building
717 Madison Place, N.W.
Washington, D.C.

Entered: November 2, 1994

TRANSCRIPT OF BENCH RULING BY
THE HONORABLE JUDGE JAMES T. TURNER

On November 2, 1994, the parties met, pursuant to the notice of the Judge, at 10:30 a.m.:

THE CLERK: All rise.

THE COURT: Please be seated. Ladies and gentlemen, I think I am in a position to make a ruling on the parties' motions for summary judgment at this time, and without keeping everybody in suspense, let me just say at the outset that it's my opinion that the Plaintiff's motion for

summary judgment should be granted, and it results from that that [sic] the Defendant's motion should be denied.

Now, it is incumbent on me to state a rationale for that, and the reason for that ruling is as follows: The core dispositive issue in this case as well laid-out in the briefs of both parties, is the meaning of the term, the current CHAMPUS prevailing rate.

It is the Plaintiff's position that that phrase should be construed the same as current CHAMPUS prevailing charge as that term appears in the controlling CFR's cited in the parties' briefs, and the CHAMPUS guidelines that are detailed in the briefs and the appendices.

It is the Defendant's position that it should be construed to mean the same thing as a reimbursable or allowable rate as used in the CFR and in other controlling documents.

It is my finding, based on a plain meaning of the term used in this contract, within the context in which the parties were dealing, that current CHAMPUS prevailing rate has the same meaning, and was intended by the parties to have the same meaning as current CHAMPUS prevailing charge.

There has been some discussion in the case of whether this kind, these motions should be resolved on the basis of plain meaning of language, or whether there is an ambiguity which has to be resolved.

It is my view that there is not an ambiguity in these contracts. Before an ambiguity can arise, there must be, within the context in which the parties were dealing, two reasonable interpretations of the language, and I cannot escape, after a lot of reflection, the feeling that the only reasonable interpretation, given the context in which the parties were dealing, of current CHAMPUS prevailing rate is that the parties meant the same thing which those guidelines refer to, the CHAMPUS guidelines refer to as the prevailing charge.

That is the 80th percentile of a sampling of these charges by Kentucky doctors for a specific time period. All of this is very well-detailed in the partiest filings, and the ruling I am making, and my reading of that term, it seems to me, is the very same reading that an Army representative, when this dispute was fresh in everybody's mind, agreed with, and that is that letter from Col. Henry that we mentioned during the argument, the February 23, 1990 letter from Col. James M. Henry which is at page 39 of the appendix to the Defendant's motion filed on July 11th.

Col. Henry is obviously, Col. Henry, as the signer of at least one of these MOUs, and as the Army representative at the hospital that's in question in this case, obviously equates area prevailing rate with the current CHAMPUS prevailing charge, and that's entirely consistent with the Plaintiff's position.

So to neaten this up, let the record be clear that the motions that are being ruled on, are the motions for summary judgment filed by each party on July 11, 1994.

Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

(2)

No. 97-3

In the Supreme Court of the United States

OCTOBER TERM, 1996

TOTAL MEDICAL MANAGEMENT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the court of appeals abused its discretion by considering and resolving a question for the first time on appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-3

TOTAL MEDICAL MANAGEMENT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-14) is reported at 104 F.3d 1314. The decision of the Court of Federal Claims granting summary judgment for petitioner (Pet. App. 15-16, 22-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1997. A petition for rehearing was denied on March 27, 1997. Pet. App. 20-21. The petition for a writ of certiorari was filed on June 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) administers a health plan for certain military dependents. To provide optimal medical care for beneficiaries, military hospitals may enter partnership agreements with civilian health care facilities. See 32 C.F.R. 199.1(p); 10 U.S.C. 1096(a). The terms of those agreements, including provision for reimbursement, are typically memorialized in memoranda of understanding (MOUs).

Prior to October 1988, the applicable CHAMPUS payment regulation provided that the allowable charge for authorized care was the lower of:

> (A) The billed charge for the service;
>
> (B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.

32 C.F.R. 199.14(h)(1)(i) (1989).

Effective October 1, 1988, Congress modified the reimbursement rules. Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8019, 102 Stat. 2270-20. Under the regulation implementing the new reimbursement rules, the allowable charge must be the lowest of:

> (A) The billed charge for the service.
>
> (B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.

* * * * *

> (C) For charges from physicians and other individual professional providers, the fiscal year 1988 prevailing charges adjusted by the Medicare Economic Index (MEI), as the MEI is applied to Medicare prevailing charge levels.

32 C.F.R. 199.14(g)(1)(i) (1990).[1]

Beginning in November 1988, the Ireland Army Hospital in Fort Knox, Tennessee, and petitioner entered into a series of MOUs, all providing for reimbursement at 75 or 80 percent of the "current CHAMPUS prevailing rate." Prior to the adoption of the new payment rules, the term "current CHAMPUS prevailing rate" was equated with the "prevailing charge," that is, the 80th percentile of billed charges for similar services during a base period. 32 C.F.R. 199.14(h)(1)(i)(B) (1989). Following the addition of the MEI reimbursement limitation, payments to petitioner were calculated at 75 or 80 percent of the MEI-adjusted rate, rather than at the higher "prevailing charge" rate.

In April 1992, petitioner submitted a letter to Colonel Thomas Clements, an administrator at the Ireland Army Hospital, purporting to make out a claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, for $52,746.28, the difference between the MEI-adjusted rate and the "prevailing charge" rate. See Pet. App. 7. In response, Colonel Clements advised petitioner that he was not a contracting officer

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[1] While the new reimbursement rules went into effect with the passage of the 1989 appropriations act, the regulation implementing those rules became effective April 10, 1990. 55 Fed. Reg. 13,265 (1990).

and that the MOUs were not proper subjects of a CDA claim. *Ibid.* In December 1992, petitioner filed a complaint in the Court of Federal Claims invoking the court's jurisdiction under the CDA. After the court rejected the government's argument that the MOUs were not enforceable contracts, the parties filed cross-motions for summary judgment. The Court of Federal Claims granted petitioner's motion for summary judgment, reasoning that the language in the MOUs basing reimbursement on the "prevailing rate" required reimbursement based on the "prevailing charge." *Id.* at 23-24.

The government sought reconsideration. In its order denying the motion for reconsideration, the Court of Federal Claims rejected the government's argument that the MOUs were not enforceable contracts, and found that the MOUs were "contracts resulting from an offer, acceptance, and consideration." Pet. App. 18.

The court of appeals reversed, holding that, although the MOUs met the basic requirements for a government contract, they were void because they were "in direct conflict with CHAMPUS regulations." Pet. App. 13. Specifically, the court concluded that the regulatory scheme in effect at the time the MOUs were entered into or renewed "explicitly limited health care provider reimbursement base rates to the lowest of three possibilities: the billed charge, the prevailing charge, or the MEI limited prevailing charge." *Ibid.* The illegality of agreements, like the MOUs, that "obligate[d] CHAMPUS beyond these base rates set by regulation" was "plain." *Ibid.* Moreover, since the new regulatory reimbursement scheme was in effect when the MOUs were entered into, petitioner "was on constructive

and actual notice" that this regulation governed CHAMPUS payments. *Ibid.* Since the agreements plainly exceeded the agency's regulatory authority, the court of appeals ruled that the MOUS were "void *ab initio*." *Ibid.* The court of appeals remanded the case with instructions to dismiss for failure to state a claim. *Ibid.*

Dissatisfied with the court of appeals' decision, petitioner sought rehearing. Petitioner conceded that any contract requiring reimbursement at rates above the lowest of the three charges contained in the applicable regulation "would be void and illegal." Pet. for Reh'g 4. Nonetheless, petitioner argued that the validity of the MOUs turned on "how much was paid, how was it paid, what was the contractual intent." *Id.* at 6. At the request of the court of appeals, the government responded to the petition for rehearing, explaining that since, as the court of appeals had concluded, the MOUs were void *ab initio* as beyond the power of the government representative, petitioner's argument concerning the implementation of the agreements was irrelevant. Resp. to Pet. for Reh'g 4-5. The court of appeals denied the petition for rehearing.

ARGUMENT

This case does not warrant further review. It presents no important unresolved issue of law and does not conflict with any decision of this Court or any other court of appeals. Although petitioner acknowledges (Pet. 6) that, under this Court's ruling in *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976), the courts of appeals have discretion to consider and resolve an issue for the first time on appeal, petitioner

makes several arguments that such discretion was abused in this case. All lack merit.

First, petitioner suggests (Pet. 6) that the court of appeals did "not hear[] any argument on the decisive issue," that is, whether the terms of the contracts conflicted with the applicable regulation. In fact, as discussed above, petitioner filed a rehearing petition setting forth its position on this issue, and the government responded at the court's request. Thus, contrary to petitioner's claim, the court of appeals had an opportunity to consider the legal arguments of both parties before reaching its final decision to deny rehearing.

Second, petitioner asserts (Pet. 6-7) that whether the MOUs conflicted with the regulation is an issue requiring further factual development. Having found the agreements void *ab initio*, the court of appeals correctly remanded the case with instructions to dismiss. Since there was no dispute regarding the wording of the agreements or the applicability of the regulation, no additional fact finding could have any bearing on the purely legal issue whether the MOUs complied with the terms of the regulation.

Finally, petitioner alleges (Pet. 7) that the court of appeals' decision conflicts with the decisions of several other courts of appeals. However, the decisions relied on by petitioner stand for the unexceptionable proposition that when a court of appeals' decision involves new issues or legal theories, the parties should be permitted to develop "facts relevant to the decision." *Heirs of Fruge* v. *Blood Services*, 506 F.2d 841, 844 n.2 (5th Cir. 1975); see *Arlinghaus* v. *Ritenour*, 622 F.2d 629, 638 (2d Cir.), cert. denied, 449 U.S. 1013 (1980); *Box* v. *A&P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985), cert. denied 478 U.S. 1010 (1986);

Charbonnages de France v. *Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979). Where, as here, there are no relevant facts to develop, remanding the case, as petitioner suggests, would be both pointless and wasteful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1997